AMERICAN HOME ASSURANCE CO.

v.

NALIN INDUSTRIES SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI ABDUL HAMID BIN OMAR LP, TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), TAN SRI DATO' MOHD. EUSOFF BIN CHIN SCJ.
[CIVIL APPEAL NO. 02-128-1991]
24 JUNE 1993

INSURANCE LAW: Boiler machinery belonging to respondent covered by insurance - Breakdown of boiler seven months after operation - Losses caused by breakdown claimed under policy - Disputed by insurers - That loss was not an "accident" as defined under policy - Whether the breakdown was covered by the policy.

EVIDENCE: Onus of proof on insurer and insured - Which party bears the onus of proving that an exemption under a policy of insurance applies.

The respondent, Nalin Industries S/B ("Nalin") had installed a steam boiler in their plant and taken out a policy of insurance with the appellant, American Home Assurance Co.("AMA") in order to provide cover against the risk of loss resulting from any "accident."

"Accident" was defined in the policy as:

> ... a sudden and accidental breakdown of the Object or a part thereof which manifests itself at the time of its occurence by physical damage to the Object that necessitates repair or replacement of the Object or part thereof but accident shall not mean
>
> (a) depletion, deterioration, corrosion, or erosion of material
>
> (b) wear or tear

The boiler suffered a rupture in the upper coil twice some 7 months after its installation. This resulted in a leakage of water which required a shut down of the plant. AMA was informed of the failure and a claim by Nalin for losses suffered as a result of the shut down was submitted to AMA. However, AMA repudiated liability. The High Court found in favour of Nalin. AMA appealed.

AMA repudiated liability on the grounds that the failure was not "a sudden and accidental breakdown" of the boiler. The evidence from its expert witness in metallurgy was that corrosion fatigue caused by the presence of excessive oxygen in the feed water in the boiler lead to the rupture of the coil. Thus, the Appellant submitted, corrosion fatigue had begun to set in early and took about 7 months before it manifested itself. The failure therefore could not be described as "sudden". Again, corrosion fatigue came within the exemptions set out in the policy, ie. para (a) and (b) above.

The respondent argued that caselaw showed that an "accident" meant any unintended and unexpected occurrence which produced a loss. The coil was expected to last for the lifetime of the boiler and thus its rupture seven months after its operation was an occurrence which was unintended and unexpected. The evidence showed that Nalin had followed all the manufacturer's operating instructions.

Held:

[1] The respondent bears the burden of establishing that its claim falls within the peril insured against. However, the onus of proving that the event comes under a certain exemption lies on the party repudiating the claim, the appellant.

[2] The crux of the matter is what caused the corrosion fatigue? It is settled in insurance law that the 'cause' is that which is the effective or dominant cause. The actual cause of the corrosion fatigue was the build up of a thick porous layer of magnetite on the metal part of the coil which in turn was a result of a lack of water in the boiler.

[3] The dominant cause of the accident was therefore a lack of water in the boiler. This is substantiated by the fact that since the introduction of more feed water the boiler has continued to function without any mishap.

[4] The lack of feed water cannot be attributed to any fault on the part of the respondents. They had not intentionally fed insufficient water but had merely followed manufacturer's instructions to the letter.

[Appeal dismissed with costs].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG INSURANS: Jentera dandang milik responden dilindungi oleh insurans - Dandang rosak selepas tujuh bulan berfungsi - Kerugian disebabkan oleh kerosakan tersebut dituntut di bawah polisi -

Tuntutan dipertikaikan oleh penanggung insurans - Alasan bahawa kerugian bukan satu "kemalangan" sebagaimana yang ditakrifkan di bawah polisi - Sama ada kerosakan dilindungi oleh polisi.

KETERANGAN: Beban membukti di atas penanggung insurans dan yang diinsuranskan - Pihak mana yang menanggung beban untuk membuktikan bahawa suatu pengecualian di bawah polisi insurans adalah terpakai.

Responden, Nalin Industries S/B ("Nalin") telah memasang satu dandang stim di kilang mereka dan telah mengambil satu polisi insurans dengan perayu, American Home Assurance Co. ("AMA") untuk mendapatkan pelindungan terhadap risiko kerugian yang diakibatkan oleh sebarang "kemalangan".

"Kemalangan" ditakrifkan dalam polisi sebagai:

> ... kerosakan dan kemalangan yang tiba-tiba akan objek atau mana-mana bahagian daripadanya itu yang tertera pada ketika ia berlaku melalui kerosakan fisikal kepda objek berkenaan yang memerlukan pembaikan atau penggantian akan objek atau mana-mana bahagian daripadanya itu tetapi kemalangan tidak harus bermaksud
>
> (a) kehabisan, kemerosotan, pengakisan atau kehausan bahan
>
> (b) rosak-rosot

Dandang tersebut mengalami pecahan dalam gegelung atas sebanyak dua kali selepas kira-kira 7 bulan ia dipasang. Ini telah mengakibatkan kepada kebocoran air yang menghendaki kilang supaya ditutup. AMA telah diberitahu mengenai kerosakan tersebut dan tuntutan oleh Nalin bagi kerugian yang ditanggung akibat penutupan kilang telah dikemukakan kepada AMA. Walau bagaimanapun, AMA telah menolak liabiliti. Mahkamah Tinggi membuat keputusan memihak kepada Nalin. AMA membuat rayuan.

AMA menolak liabiliti atas alasan bahawa kerosakan tersebut bukan "kerosakan dan kemalangan yang tiba-tiba" akan dandang tersebut. Keterangan daripada saksi pakarnya dalam kaji logam adalah bahawa kelesuan, pengakisan yang disebabkan oleh kehadiran oksigen yang berlebihan dalam saluran suapan air dalam kandang membawa kepada pecahan gegelung. Maka, perayu menghujahkan, kelesuan pengakisan telah bermula dengan awal dan mengambil masa kira-kira 7 bulan lamanya sebelum ia jelas kelihatan. Oleh yang demikian kerosakan tersebut tidak boleh digambarkan sebagai "tiba-tiba". Sekali lagi, kelesuan pangakisan tergolong dalam lingkungan pengecualian yang dinyatakan dalam polisi tersebut, iaitu perenggan (a) dan (b) di atas.

Responden mendebatkan bahawa kes undang-undang menunjukkan bahawa sesutau "kemalangan" bermakna kejadian yang tidak diniatkan dan tidak dijangka yang mengakibatkan kerugian. Gegelung berkenaan dijangka untuk tahan selama hayat dandang tersebut dan oleh kerana ia pecah tujuh bulan selepas ia berfungsi adalah merupakan satu kejadian yang tidak diniatkan dan tidak dijangka. Keterangan berkenaan menunjukkan bahawa Nalin telah mengikuti segala arahan operasi pengilang.

Diputuskan:

[1] Responden menanggung beban untuk membuktikan bahawa tuntutannya adalah tergolong dalam bahawa yang ia diinsuranskan terhadap. Walaubagaimanapun, beban membukti bahawa kejadian tersebut tergolong di bawah pengecualian yang tertentu bergantung ke atas pihak yang menolak tuntutan tersebut, perayu.

[2] Persoalan pokoknya ialah apa yang menyebabkan kelesuan pengakisan ia yang mana berkesan atau penyebab yang paling menonjol. Sebab sebenar kelesuan pengakisan tersebut adalah pengumpulan lapisan poros magnetit yang tebal pada bahagian logam gegelung di mana ini kemudiannya menjadi penyebab kepada kekurangan air dalam dandang.

[3] Oleh yang demikian penyebab yang menonjol akan kemalangan tersebut adalah kekurangan air dalam dandang. Ini disokong oleh fakta bahawa semenjak pengenalan saluran suapan air yang yang lebih dandang tersebut telah terus berfungsi tanpa kejadian yang tidak diingini.

[4] Kekurangan saluran suapan air yang tidak boleh dianggap berpunca daripada apa-apa kesalahan dipihak responden. Mereka tidak dengan sengaja menyuap air yang kurang tetapi hanya betul-betul mengikut arahan pengilang.

[Rayuan ditolak dengan kos].

Cases referred to:
Regina Fur Co. Ltd. v. Bossam [1958] 2 Lloyd's Rep. 425 ***(refd)***
Fenton v. J. Thorley & Co. Ltd. [1903] AC 443 ***(refd)***
Leyland Shipping Co. v. Norwich Union Fire Insurance Society [1918] AC 350 ***(refd)***
Gray v. Barr [1971] 2 All ER 949 ***(refd)***

For the appellant - V. Pradhan (N. Pathmanathan with him); M/s. Skrine & Co.
For the respondent - Cecil Abraham (Navaratnam with him); M/s. Shearn Delamore & Co.

JUDGMENT

Mohd. Eusoff bin Chin SCJ:
The respondent operated a plant at PLO/23 Jalan L, Pasir Gudang, Johor, for the purposes of refining edible palm oil. The plant included a steam boiler known as Wanson Vaporax Model 1000 HP Steam Generator (hereinafter referred to as the boiler).

By a Boiler and Machinery Policy of Insurance valid between 1 November 1982 to 31 December 1983, the respondent insured its plant and machinery including the boiler, with the appellant, against the risk of loss resulting from any "accident" as defined in the policy while the said plant and machinery were in operation.

On 28 November 1982 a rupture in the upper coil of the boiler caused a leakage of water which in turn resulted in the whole plant being shut down. The appellant was immediately informed of the failure. Temporary repair work was carried out pending the arrival of a new coil. The plant was started up on 5 December 1982. But on 12 December 1982, the repaired coil failed again when another rupture occurred diametrically opposite the first rupture. The plant was shut down. The new coil arrived from the manufacturers in Belgium on 17 December 1982, and the plant started operation on 21 December 1982.

On 5 April 1983 the respondent submitted to the appellant its claim for losses suffered due to the shut down of operation. A series of correspondence, discussions, and meetings between the parties followed. Then by a letter dated 7 November 1983, the appellant repudiated its liability to the respondent. On 23 January 1984 the respondent issued its Writ of Summons against the appellant.

The High Court heard the issue on liability and decided, on 7 March 1991 that the appellant was liable to the respondent for the losses under the insurance policy, and hence this appeal.

The boiler is of a closed circuit type which means that when a certain quantity of water is filled into the coils of the boiler, it is sealed off, and the boiler is operated with that same quantity of water throughout its operation. The equipment consists of one double helical coil of low carbon steel enclosed in a cylindical outer jacket of mild steel plates.

The purpose of the boiler is to generate steam. Once the boiler is started up, or fired, the water in the coils is heated, steam is formed and the steam is passed into another section of the plant called the deodoriser. In the deodoriser, the steam condenses into water and returns to the boiler where the process is repeated. This means that at all times there will be steam generated in the boiler; there will be steam in the deodoriser and there will be water returning to the boiler.

The evidence shows that the respondent had installed the boiler in accordance with the manufacturers' operating manual. The oxygen in the feed water was removed by subjecting it to a vacuum prior to introducing it into the boiler. This process was known as deaerading the system and was an effective method of removing oxygen from water. The recommended amount of water was 285 litres which was about 45 gallons. After the last bursting of the coil, the boiler's manufacturer and suppliers sent their engineers to supervise the repairs. Tests carried out showed that the minimum amount of water required to operate that boiler properly was 200 gallons. However, 210 gallons of water was introduced into the boiler after it was repaired in December 1982, and since then the boiler had been running without any breakdown till the date of hearing in December 1986. Indeed, the learned Counsel for the respondent informed us that it is still running without complaint up to the date of the hearing of this appeal, that is, for the last 11 years.

The respondent's claim is that the rupture or failure of the coil in the boiler on 28 November 1982 was an accident within the terms of the insurance policy and consequently, the losses suffered as a result of the shut down of the plant are recoverable losses under the insurance policy.

The appellant's defence as pleaded in its statement of defence can be enumerated as follows -

(i) the failure of the coil was not an 'accident' within the meaning of the insurance policy, and was therefore, not a peril insured against;
(ii) the failure of the coil comes within the first and second exemptions in the definition of 'accident' in the policy, that is, it was caused by depletion, deterioration, corrosion, or erosion of material and/or wear and tear;
(iii) the respondent was in breach of condition 8 of the policy which, read with condition 12, made it a condition precedent that no action would lie unless all reasonable steps to maintain the insured property in efficient working order and condition has first been satisfied.

The memorandum of appeal contains the same three grounds of appeal, but before us, the learned Counsel for the appellant did not wish to proceed with ground (iii) i.e. that the respondent did not maintain the insured property efficiently.

The insurance policy defines 'accident' as follows -

> Accident shall mean a sudden and accidental breakdown of the Object or a part thereof which manifests itself at the time of its occurrence by physical damage to the Object that necessitates repair or replacement of the Object or part thereof but accident shall not mean
>
> (a) depletion, deterioration, **corrosion**, or erosion of material;
> (b) wear or tear;....

The appellant relies heavily on the evidence of Simon Andrew Cox (DW2) who was the appellant's expert witness in metallurgy who gave his findings based primarily on metal analysis. He had examined the ruptured portion of the coil and found a thick porous layer of magnetite (75-l00 mm) on the inner surface of the tube. The normal or permissable thickness of magnetite would be 10 mm. His conclusion was that oxygen above the acceptable level was present in the feed water in the boiler. Although only steam was present at that portion of the coil which ruptured, he was of the view that oxygen together with steam blanketting, thermal stress and water splashings gave rise to corrosion fatigue crack. According to him **corrosion fatigue** caused the rupture of the coil. DW2 did not deny under cross examination that the coil was manufactured to last for hundreds of years or the life time of the boiler. Nevertheless, it is the appellant's submission that the rupture of the coil was not the result of an accident as defined in the policy.

It is of course incumbent on the respondent as the plaintiff to establish that the loss it suffered arose out of an accident to an object covered by the policy. In *Regina Fur Co. Ltd. v. Bossam* [1958] 2 Lloyd's Rep. 425, Evershed MR held that the onus of proving that its case fell within the policy, remained at all times with the insured. While this case serves only to reaffirm the trite position that the onus is on the plaintiff to establish that it comes under the peril insured against, the burden is not on the respondent (plaintiff) to establish that the event which took place, namely the rupture of the coil, falls within any of the exceptions to the definition of 'accident' in the policy. That onus is on the appellant to prove that the rupture falls under the exception and was therefore not an accident.

The respondent argued that the definition of accident in the policy consists of three component parts and they are -

(i) a sudden and accidental breakdown of the object or part thereof;
(ii) which manifests itself at the time of its occurance by physical damage to the object;
(iii) that necessitates repair or replacement of the object or part thereof.

Clearly, items (ii) and (iii) had been satisfied in that the boiler had suffered physical damage in the form of the rupture to its coil, and that the damage necessitated repair or replacement of the coil. The only issue left is whether the rupture of the coil can be described as sudden and accidental breakdown.

The learned Counsel for the appellant submitted that the cause of the rupture was **corrosion fatigue** which took about seven months to manifest itself after the boiler was first put into operation. Therefore, it could not be described as 'sudden'.

The respondent's argument is that the Court should only be concerned with the sudden manifestation and the accidental nature of the failure.

In *Fenton v. J. Thorley & Co. Ltd.* [1903] AC 443 the House of Lords held at page 453, per Lindley LJ:

> The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any **unintended** and **unexpected** occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and **if the cause is not known** the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.

At p. 456 of that case, the learned Judge dealt with the question of causation:

> But if personal injury is caused to a workman, and it arises out of and in the course of an employment to which the Act applies, it appears to me that *prima facie* the act entitles him to compensation, **but that this inference may be displaced by proof that the injury is attributable to his own serious and wilful conduct or to some other cause which shows that the injury was not accidental.**
> (emphasis added)

The word 'accident' therefore does not include any damage which is caused deliberately or intentionally. The evidence shows that the ruptured coil was installed in April 1982, that is about seven months prior to the rupture. Even DW2 had agreed that in the absence of fatigue component of the corrosion fatigue mechanism, the coil is expected to last for hundreds of years.

It is the respondent's argument that since the coil was expected to last for at least the life span of the boiler, the rupture of the coil seven months after its installation was an occurance which was never expected or intended to occur.

The question is therefore: did the respondent design or forsee the bursting of the coil? If it did not, then the accident is within the meaning of the policy. The evidence in Court shows that the respondent had followed the manufacturer's operating manual when installing and running the boiler. The accident here is the rupture of the coil. It occurred suddenly and unexpectedly because the coil was supposed to last the life-time of the boiler.

What caused the coil to burst? The appellant's expert witness said it was caused by corrosion fatigue due to the presence of oxygen in the feed water, while the respondent alleged that even if there was corrosion fatigue it was caused by lack of water in the boiler.

In *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918], AC 350 the Privy Council dealt with the question of 'proximate' cause as opposed to remote cause of damage. Lord Shaw of Dunfermline stated at p. 369:

> (d) What does "proximate" here mean? To treat proximate as if it was the cause which is proximate in time is ... out of the question. The cause which is truly proximate is that which is proximate **in efficiency**. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the **real efficient cause** to which the event can be ascribed.
> (emphasis added)

In *Gray v Barr* [1971] 2 All ER 949, at 955 Lord Denning M.R. stated that it had been settled in insurance law that the 'cause' is that which is the effective or dominant cause, of the occurance, or as it is sometimes put, what is **in substance** the cause, even though it is more remote in point of time, such cause to be determined by common sense.

On the facts, we find that the coil was made to withstand great pressures from the steam and would last for hundreds of years. It would not burst unless any part of it was weakened. The appellant said that corrosion fatigue caused the coil metal to weaken and burst.

But what actually caused the corrosion fatigue? We find that it is the built up of thick porous layer of magnetite on the metal part of the coil which weakened the coil. What then caused this built up of porous layer of magnetite? Was it the presence of oxygen or the absence of sufficient water in the boiler? The

evidence before us clearly shows that it was lack of water in the boiler which largely contributed to the build up of the porous layer of magnetite. The fact shows that since the introduction of more feed water into the boiler, the coil has continued to function without any mishap. We, therefore, find that the dominant cause of the accident is not corrosion or corrosion fatigue but the lack of feed water in the boiler. We also find that the respondent did not intentionally or deliberately feed insufficient water into the boiler as they had followed the manufacture's instruction manual to the letter.

We, therefore, dismiss this appeal with costs.

DATUK LIM KHENG KIM

v.

MALAYAN BANKING BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), DATO' PEH SWEE CHIN SCJ, DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-51 OF 1992]
4 JUNE 1993

BANKRUPTCY: Application to set aside bankruptcy notice - Whether affidavit filed under Rule 95 of Bankruptcy Rules 1969 complies with the provisions of Form 7 and the requirements of s. 3(1)(i) of the Bankruptcy Act 1967 - Affidavit filed in opposition to creditors petition - Whether effective and good in law.

The appellant, after having been served with a bankruptcy notice, filed an affidavit (Enclosure 3) to set aside the bankruptcy notice under Rule 95 of the Bankruptcy Rules 1969 (the Rules). The trial Judge held that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made and accordingly made orders in terms of the respondent's application.

On appeal, the question that arose was whether the affidavit filed by the appellant, which failed to follow both in form and substance Form No. 7 of the Rules, could be treated as an application to set aside the bankruptcy notice under Rule 95 of the Rules.

The appellant also filed an affidavit in opposition (Enclosure 15) to the creditors petition filed and served by the respondent. The question that arose for determination was whether this affidavit, which did not comply with the provisions of Rule 117 of the Rules which provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute, was ineffective and bad in law.

Held:

[1] Enclosure 3 merely denied and disputed that the appellant was indebted to the respondent for the sum stated in the bankruptcy notice but failed to disclose that he had a counterclaim, set-off or cross demand against the respondent which he is required to depose under s. 3(1)(i) of the